FARAD CONTINUATION SHEET NO.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5637 OF 2005

Office notes, office Memoranda of appearances, Court's orders or directions & Registrar's orders.	Coram, : Court's or Judge's Orders : .

Mr. N.V. Bandiwadekar for petitioner
Mr. M. H. Solkar for respondent

CORAM: SMT. RANJANA DESAI, J.
30/8/05

P.C.:-

. Rule. Respondents waive service. By consent of the parties, the petition is taken up for hearing.

2. The petitioner in this writ petition is the plaintiff in R.C.S. No. 7/04. The suit is filed against the State of Maharashtra and the Dy. Engineer, Public Works, Sub-Division Karad for permanent injunction and declaration. According to the plaintiff he is in possession of suit property from 1980. The land on which his shop is situated is not acquired for road. Inspite of this the

defendants have issued notice to the plaintiff alleging that the plaintiff has encroached upon the road and hence he should vacate the suit property. In the circumstances the plaintiff was driven to file a suit.

3. The defendants in their written statement have contended that the description of property stated in paragraphs A and B of the plaint is not proper and correct. The description is vague. On account of incorrect, incomplete, vague descreption the plaintiff is not entitled for any relief. In short the defendant’s case is that the plaintiff’s premises stand on the road and they are on a property which is acquired for construction of road.

4. In this suit the plaintiffs filed an application for appointment of court commissioner for local inspection for taking measurement of gutter, road etc. and to find out whether suit shed is in one line from shops of Gram Panchayat and Highway

and for the purpose of showing its width and length and distance from the road. The defendants objected to the appointment of commissioner. The trial court by the impugned order rejected the application holding that the plaintiff has to prove his case by adducing evidence and the commissioner cannot be appointed to collect evidence. This order is challenged before me.

5. I have heard Mr. Bandiwadekar the learned counsel for the petitioner. He has drawn my attention to the judgment of this court in Kisanlal Maniklal Rathi v. Dinkar Yashwant Patil, 2004 (1) M.L.J. 138. He contended that the trial court's order is contrary to the law laid down by this court in Kisanlal's case I find substance in this submission.

6. In Krishnarao v. Mahadeorao, 1953 N.L.J. Note 230, 72 where the scope of Order 26 Rule 9 has been discussed, after quoting Order 26 Rule 9 this court has observed;

"Under the above rule, the Court has a discretion to order local investigation or not. The object of local investigation is not so much to collect evidence which can be taken in Court but to obtain evidence which from its peculiar nature can only be had on the spot. Cases of boundary disputes and disputes about the identity of lands are instances when a Court should order a local investigation under this rule. In order to determine whether there has been an encroachment, it is always desirable to get the fields measured by an expert and find out the exact area encroached upon. Oral evidence cannot conclusively prove such an issue."

7. After so holding this court observed that the order of the lower court refusing to appoint a commissioner amounted to a refusal to exercise jurisdiction. This court set it aside and allowed the plaintiff’s application under Order 26 Rule 9 of

the Civil Procedure Code, for appointment of Commissioner.

8. In Kisanlal’s case (supra) this court was considering a somewhat similar fact situation. There the plaintiff had filed a suit on the strength of title. His case was that the defendant had made encroachment on his land while considering whether a commissioner should be appointed to take measurements of the property, this court reiterated the principles laid down in Kisanlal’s case and directed the trial court to appoint a commissioner to take measurements of the property in question.

9. In this case it is the contention of the defendant that the description of the suit property is vague, incorrect and incomplete and the land on which the plaintiff’s stall is situated is government land. It is acquired by the government for the purpose of Karad Yelgaon - Chandoli road. According to the defenant all the persons using the

property out of the road are unauthorised and illegal occupants who do not have any protection in law and the notice to remove is given in accordance with law. It is also their contention that even though presently actual road is not passing through the disputed property still it is the property of the government and the plaintiff has no legal right to occupy it. It is further stated that the shed of the plaintiff comes within the prohibited area of ribbon development.

10. The trial court has observed that the plaintiff has to prove his case by adducing evidence and the Court commissioner cannot be appointed to collect evidence. This proposition cannot be disputed. But here the appointment of Commissioner would not amount to collecting evidence. The court commissioner will only take measurements of the disputed property and locate its situation. It will in no way amount to collecting evidence for the plaintiff or giving a go by to the defendant’s case that the land

belongs to the government. It will only bring the measurements on record which in the nature of things witnesses may not be able to give. The defendants can alway prove their case of unauthorised occupation by leading evidence. Morever the report can always be challenged. Viewed in the light of the judgments of this court in Krishnarao's case and Kisanlal's case (supra) I am of the opinion that the impugned order must be set aside.

11. Hence the impugned order dated 11/8/2005 passed by the Civil Judge, Senior Division, Karad is set aside. The trial court is directed to appoint commissioner as requested by the plaintiff in his application dated 24/6/05. The commissioner shall take inspection of the suit property and submit his report at the earlier because I am informed that the suit is made time bound by the High Court. The trial court shall pass appropriate orders regarding costs.

12. The parties are expected to cooperate and get the suit decided within time limit set by this court.

13. The writ petition is disposed of in the aforesaid terms.